by a civil action, we therefore will take a more summary mode of doing it, and will treat this civil contract as a matter punishable, not strictly criminally, but as a way of enforcing the performance of the contract. I do not think it is reasonable to consider it as if you were treating the matter as a crime, or a criminal offence. I do not think this young man will consider himself a bit the worse after fourteen days in prison as there is no imputation upon his honesty or his morals, and possibly it is the only mode by which this civil contract can be carried out. The question is, is it any answer to his wilfully and deliberately acting contrary to that which the law by his own contract imposed on him, that he was advised by a person to do so and so? It seems to me that would be contrary to good sense. If a person wilfully, knowingly and designedly does that which was done in this case, he must take the consequences; and one consequence is, that by act of parliament justices have jurisdiction to punish him in a sense, that is in the sense, it seems to me, to compel him to perform his contract. I do not think, however right the decisions may be that have been mentioned to us, that they extend to this case. This young man has broken his contract, and the consequence is, the justices had jurisdiction to do what they did."

In my view of the instant case the learned magistrate was bound to find the tenant respondents guilty and I therefore allow this appeal, adjudge the respondents guilty of the offence charged, and set aside the order of acquittal. In view, however, of the extenuating circumstances under which the offence was committed, I direct in accordance with section 242(1) of the Criminal Procedure Code that the respondents be released after due admonition (and the only admonition due would seem to be advice not to trust lawyers). Section 245 of the Criminal Procedure Code prevents this order from being used by the landlord appellant as a conviction for the purposes of section 15(1)(k) of the Rent Control Ordinance. The result is that nobody will leave this court happy but that justice, as I hope, will have been done.

Appeal allowed.

PUBLIC PROSECUTOR v. SIEW SUNG

[R.Cr.J. (Ong Hock Thye Ag.C.J.) October 18, 1965]

[K.L. — Criminal Revision No. 25 of 1965]

Lotteries — Operating pin-table without permit — Hearsay evidence — Statement to police officer in course of investigation — Criminal Procedure Code (Cap. 6), s. 113 — Lotteries Ordinance, 1952, s. 10(1).

The accused was convicted of promoting a lottery by operating a pin-table without a permit. The police found the pin-table in a shop. The police inspector's evidence was that his inquiries led him to believe that the accused was the owner of the machine but no evidence was called to show who was the owner of the pin-table. A police sergeant also gave evidence that the accused came to the police station and opened the machine, revealing a collection of $6 in ten cent coins.

Held: the evidence of the police inspector was inadmissible being hearsay and the evidence of the police sergeant was inadmissible having regard to section 113 of the Criminal Procedure Code. Therefore there was no evidence in this case to show that the accused had anything to do with the pin-table and his conviction must therefore be quashed.

Cases referred to:—

(1) *Lee Lian* v. *Public Prosecutor* [1956] M.L.J. 191.

(2) *Nagalingam* v. *Public Prosecutor* [1957] M.L.J. 196.

(3) *Meelamchan* v. *Public Prosecutor* [1962] M.L.J. 213.

CRIMINAL REVISION.

Ong Hock Thye Ag.C.J.: On October 8, 1965 the accused was convicted in the magistrate's court at Kuala Lumpur, under section 10(1) of the Lotteries Ordinance, 1952, of promoting a lottery, to wit, operating a pin-table without being in possession of a valid permit in that behalf, and was fined the sum of $300, in default 3 weeks' imprisonment. The case came to my notice quite fortuitously and I called for the record under my powers of revision.

The evidence for the prosecution may be summarised in a few words. At about 3.40 p.m. on May 12, 1965 Inspector Lee Woh Onn led a police party into a shop, found a pin-table machine against a wall, tested it by inserting a ten-cent coin, found it in working order and thereupon arrested the accused who was seated a few feet away from the machine.

Sergeant Babjee, who accompanied the inspector, alleged that the accused was the occupier of the premises. The inspector's evidence that his enquiries led him to believe that the accused was owner of the machine, was rightly struck out as hearsay, upon objection raised by defence counsel. Neither of these witnesses told the court whether or not they had any search warrant under section 11 of the Ordinance. Presumably, they entered because the shop, as such, was open to the public. On cross-examination, however, the inspector admitted that he had not ascertained who the shop proprietor was. This, of course showed that the linch-pin of the prosecution case was missing. Defence counsel accordingly submitted that the prosecution had failed to make out a *prima facie* case, as required by section 173(f) of the Criminal Procedure Code. The accused elected to say nothing upon the defence being called and was thereupon convicted and sentenced as aforesaid.

The conviction clearly was wrong. There was no evidence that the accused was either the proprietor or, in some other manner, the occupier of the premises. What the sergeant said was plainly inadmissible as hearsay. The further evidence given by the sergeant that, two days after the raid on the premises, the accused came to the police station and opened the machine, revealing a total collection of $6 in 10 cent coins, was again inadmissible, having regard to section

113 of the Criminal Procedure Code: see the *locus classicus* on this point, *Lee Lian* v. *Public Prosecutor*;[1] also *Nagalingam* v. *Public Prosecutor;* [2] *Meelamchan* v. *Public Prosecutor.*[3]

On the prosecution evidence, therefore, the accused could have had nothing more to do with the offending machine than any other customer or invitee of the shopkeeper, whoever such person might be.

The conviction is quashed and the sentence set aside. I direct that the fine be refunded or, in case he be in prison for default in paying the fine, that he be released forthwith.

Conviction quashed; sentence set aside.

ENG AH KOW v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Thye Ag.C.J.) November 4, 1965]

[K.L. — Selangor Criminal Appeal No. 62 of 1965]

Penal Code, ss. 420 & 511 — Attempted cheating — Confidence trick.

Requiring money and asking for it *per se* is not cheating unless there was a dishonest intention to cause wrongful loss.

CRIMINAL APPEAL.

Dato' R. P. S. Rajasooria (*R. P. S. Rajasooria Jr.* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye Ag.C.J.: The appellant was originally charged in the sessions court, Kuala Lumpur as follows:

"That you on 1.6.65 at about 5.30 p.m. at room No. 506 Federal Hotel, in the District of Kuala Lumpur, in the State of Selangor, attempted to cheat one Selvarasan s/o Thampoe, and in such attempt did a certain act towards the commission of the said offence to wit, by issuing him an account closed cheque from United Chinese Bank Ltd. Hongkong bearing No. F. 68977 for HK. $3,200 and trying to induce him to give you a sum of $600, and that you have thereby committed an offence punishable under section 420 and section 511 of the Penal Code."

Counsel for the defence then raised certain preliminary objections to the charge which, in the opinion of the president, were unwarranted and therefore overruled. The trial was then adjourned to August 16, 1965, on which date the prosecuting officer, applied for an amendment of the charge by substituting "no balance of fund remained" for "account closed". The charge was accordingly amended to read as follows:

"That you on 2.6.65 at about 11.00 a.m. at room No. 506, Federal Hotel, in the District of Kuala Lumpur, in the State of Selangor, attempted to cheat one Selvarasan s/o Thampoe an advocate and solicitor, by dishonestly issuing him a cheque No. F. 68977 for $3,200 (Hongkong dollars) drawn on the United Chinese Bank Ltd. Hongkong as a deposit for the professional services of the said Selvarasan s/o Thampoe and as an intended cash loan for $1,200 (Hongkong Dollars) from him, and that when your cheque was presented for payment it was found the cheque was dishonoured as no balance of fund remained, and that you thereby committed an offence punishable under section 420 and section 511 of the Penal Code."

I do not think the result was any improvement: rather the reverse. Whereas it was clear, in the first place, that the dishonest act charged lay in an attempt to obtain $600 on the strength of a cheque drawn on a non-existent bank account, the amended charge entirely befogged this question. The reference therein to "a deposit for professional services" was irrelevant. The intention to give a loan was not (according to the amended charge) induced by any act necessarily dishonest.

By reason, however, of the provisions of section 422 of the Criminal Procedure Code, I should not have regarded the unfortunate wording of the charge as occasioning a miscarriage of justice since the defence was in no way misled to its prejudice. The confusion in the charge, nevertheless, had led to a confusion of thought on the part of the president who tried the case.

The facts relied on by the prosecution were briefly as follows. The appellant sought an introduction to the complainant, a practising advocate and solicitor of Kuala Lumpur, through a medical practitioner in Malacca. On the pretext that the appellant would be retaining the solicitor for advice and assistance in connection with a claim to a considerable inheritance in Hongkong, the appellant agreed to a certain fee, of which he offered part payment by a cheque drawn on a bank in Hongkong. To the amount thereof was added a sum of $1,200 (Hongkong) equivalent approximately to $600 (Malayan), which the appellant asked to be paid over to him for his immediate purposes. The solicitor's evidence was that he had not the ready money to pay this sum or he would have done so at the time, but he subsequently decided to defer payment till the receipt of advice that the appellant's cheque had been met. This, of course, was the classic type of confidence trick. The professional fee was to serve as a bait to lure the victim into making the payment. The story of the inheritance and the man's actual means would, of course, have been fictitious.

As it turned out, however, the learned president accepted the defence story that the appellant was a man of means whose father, mother and grandfather were millionaires and that he was well able to obtain funds, whenever he needed them, from friends and relatives or business associates. As the president puts it: "I have no reason to doubt that the accused is a widely travelled man, a very intelligent business man brought up in an atmosphere of opulence indeed from the time of his birth, had very rich